SULFEE ALIAS

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[CRIMINAL APPLICATION NO: 44-05-2004-II]
1 OCTOBER 2004

CRIMINAL PROCEDURE: *Sentence - Stay of execution - Pending appeal - Inability of applicant to pay fine - Whether sessions court judge had erred in law - Exercise of discretion of court - Criminal Procedure Code, ss. 283(i)(b), 311*

CRIMINAL PROCEDURE: *Revision - Revisionary power of High Court - Refund of cash bail deposited in court earlier - Whether order of sessions court judge for deposit to be kept as part of condition of bail illegal - Criminal Procedure Code, ss. 311, 325, 403*

This was an application by the applicant under s. 311 of the Criminal Procedure Code ('CPC') for an order that execution of part of the judgment of the learned sessions court judge wherein the applicant was imposed a fine of RM25,000 in default a further six months imprisonment be stayed, pending the outcome of an appeal he had lodged against both conviction and sentence. The two primary issues requiring consideration were: (i) the application for a stay of the order of imposition of the RM25,000 fine or in default, a further six months imprisonment; and (ii) the application by the applicant urging the court to exercise its revisionary powers to refund the cash bail of RM4,000 deposited in court earlier, which was ordered by the learned sessions court judge to be carried forward to form part of the bail of RM10,000 in two sureties which she imposed in respect of granting a stay of execution with regard to the imprisonment aspect of the sentence.

Held (allowing the application):

[1] In the instant case, since the court below had not been appraised of the applicant's inability to pay the fine for the court to exercise its discretion under s. 283(i)(b) of the CPC, it would appear that the applicant had chosen not to pay and, therefore, must be imprisoned for default. In light of the above, the learned sessions court judge had acted on the wrong

principle by ruling that she had no discretion in light of established precedents to stay that part of the sentence pertaining to the imposition of the fine of RM25,000 (or in default, six months imprisonment). Giving due regard to all relevant factors, and given the circumstances, in the exercise of this court's discretion pursuant to s. 311 of the CPC (which was the discretion of the trial court at first instance), the applicant's application was allowed. The applicant was to be released on bail in the sum of RM15,000 with two sureties, with a further order that the two sureties who had executed the bond in the court below could stand as sureties if they so desired. (pp 136 c, g-h & 137 g)

[2] The imposition of cash bail, otherwise than under the condition stipulated in s. 403 of the CPC, is illegal. A magistrate is not bound to accept cash, but may permit an accused person to deposit a sum of money *in lieu* of executing a personal bond and giving surety of some persons. However, this concession does not extend to a bond for good behaviour as is evident from the words "except in the case of a bond for good behaviour" in s. 403 of the CPC. Hence, the part of the order of the learned sessions court judge ordering that RM4,000 already deposited in court be kept in court as part of the condition of the bail, was illegal. In exercise of this court's powers under s. 325 read with s. 311 of the CPC, that order was set aside and the sum of RM4,000 was to be refunded to the applicant. (pp 138 h & 139 a-d)

[Ordered accordingly.]

Case(s) referred to:
Ganeson v. PP [1983] 2 MLJ 369
Hussaini Tan Mohamad Jaya Tan v. PP (Criminal Revision No: 43-06-2003-III (II)) (unreported) ***(foll)***
Iah Sin Seng v. PP (Criminal Application No: 44-2-2003-II) (unreported) ***(foll)***
Lau Kung Seng & Ors v. PP [1997] 5 MLJ 323 HC ***(foll)***
Mohd Noor Yunus & Ors v. PP [2000] 5 CLJ 168 HC ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 173A, 283(i)(b), 311, 325, 389, 403

For the applicant - Mohd Ivan Hussein; M/s Ivan Hussein
For the respondent - Aliza Ali DPP

Reported by Suresh Nathan

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JUDGMENT

Lau Bee Lan JC:

Vide a notice of motion dated 30 September 2004 filed under a Certificate of Urgency, the applicant has applied pursuant to s. 311 of the Criminal Procedure Code for an order that execution of that part of the judgment of the learned Sessions Court Judge given on 28 September 2004 wherein the applicant was imposed a fine of RM25,000 in default a further six (6) months' imprisonment be stayed, pending the outcome of an appeal he has lodged against both conviction and sentence.

The court has considered the oral submissions of both the counsel, Mr. Mohd. Ivan bin Hussein together with Mr. Mohd. Osman bin Ibrahim and the learned Deputy Public Prosecutor, Cik Aliza Ali, including the averments made by Mr. Mohd. Ivan bin Hussein on behalf of the applicant and the cases cited therein. The court's findings and evaluation include the following:

(1) There are primarily two (2) issues before me namely:

(a) application for a stay of the order of imposition of the RM25,000 fine or in default, a further six (6) months' imprisonment.

(b) the application by the applicant urging the court to exercise its revisionary powers to refund the cash bail of RM4,000 deposited in court earlier but which was ordered by the learned Sessions Court Judge to be carried forward to form part of the bail of RM10,000 in two sureties which she imposed in respect of granting stay of execution with respect to the imprisonment aspect of the sentence.

(2) I have cautioned myself that it is trite law that in cases where it involves the exercise of a discretionary power, the High Court will be slow to interfere unless it appears that the judge of first instance had erred in law.

This brings me to the consideration of the first issue. Both the learned counsel for the applicant (as between them) had cited the cases of *Mohd. Noor Yunus & Ors v. PP* [2000] 5 CLJ 168, *Ganeson v. PP* [1983] 2 MLJ 369, *Iah Sin Seng v. PP* (Criminal Application No. 44-2-2003-II). The learned Deputy Public Prosecutor on the other hand relied solely on the authority of *Mohd. Noor Yunus (supra).*

(3) Referring to the authority of *Mohd. Noor Yunus (supra)*, I am in agreement with the views of His Lordship, Abdul Wahab Patail J that in an application for a stay of execution under s. 311 of the Criminal Procedure Code, it is an accepted rule of practice that a stay will be granted in respect of the term of imprisonment but a fine will have to be paid essentially based on the reasoning that a fine could be refunded while the clock could not be turned back on a loss of liberty. What I wish to stress here is that as was aptly pointed out by the learned judge is that this reasoning holds true only in the case where the convicted person is able to pay the fine.

(4) Indeed as has happened in *Mohd. Noor Yunus*'s case, I believe that in this instant case neither the applicant nor his counsel brought to the court's attention the applicant's inability to pay the fine in order for the learned Sessions Court Judge to exercise her discretion appropriately under s. 283(i)(b)(4) of the Criminal Procedure Code. The material part of s. 283 of the Criminal Procedure Code states:

> 283 Provision as to sentences of fine
>
> (i) Where any fine is imposed under the authority of any law for the time being in force, then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply that is to say:
>
> (a) ...
>
> (b) *in every case of an offence in which the offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, do all or any of the following things:*
>
> (1) allow time for the payment of the fine;
>
> (2) direct payment of the fine to be made by instalments;
>
> (3) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender;
>
> (4) *direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term*, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence:

> *Provided that where time is not allowed for the payment of such fine an order for imprisonment in default of payment shall not be issued in the first instance unless it appears* to the Court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment. (emphasis added)

In this connection, I adopt the procedure to be followed with respect to s. 283(i)(b) of the Criminal Procedure Code which has been carefully delineated by the learned judge in *Mohd. Noor Yunus* at p. 172 para (a) to (f).

Thus in the instant case, since the court below has not been appraised of the applicant's inability to pay the fine for the court to exercise its discretion under s. 283(i)(b) Criminal Procedure Code, it would appear that the applicant had chosen not to pay and therefore must be imprisoned for default.

In this regard also, I would like to refer to my judgment made in *Iah Sin Seng (supra)* given on 20 June 2003 cited by Mr. Mohd. Osman bin Ibrahim in support of this notice of motion wherein I had allowed the applicant, Iah Sin Seng to be released on bail in the sum of RM30,000 with two (2) sureties. In *Iah Sin Seng (supra)*, the applicant, Iah Sin Seng was imposed a sentence of three (3) years imprisonment, whipping of two (2) strokes of rotan and fined RM30,000, in default one (1) year imprisonment. Then *vide* an application by way of notice of motion, he applied for:

(a) an order that execution of the judgment of the Sessions Court given on 13 May 2003 be stayed pursuant to s. 311 of the Criminal Procedure Code; and

(b) to be released on bail pending an appeal to the High Court pursuant to s. 389 of the Criminal Procedure Code.

In the light of the above, I am of the view that the learned Sessions Court Judge acted on the wrong principle based on the averment made in para 4 of the affidavit in support of Mr. Mohd. Ivan bin Hussein whereby the learned Sessions Court Judge ruled that she had no discretion in the light of established precedents to stay that part of the sentence pertaining to the imposition of the fine of RM25,000 (or in default, six months' imprisonment).

(5) The court takes into consideration that it would be inappropriate to revert this case to the learned Sessions Court Judge since the applicant has been in custody since 28 September 2004 as it would lead to further delay and injustice to the applicant. In considering whether the court should exercise its discretion under s. 311 of the Criminal Procedure Code, the court takes into account the following factors:

(a) Applicant has in respect of the imprisonment portion of the sentence been granted a stay and has been ordered to execute a fresh bail of RM10,000 in two sureties and RM4,000 already deposited in court to be kept in court as part of the condition of the bail. (See Order of the court below dated 28 September 2004).

(b) Further, the applicant has been ordered to report to Bintawa Police Station every first day of the month until his appeal is heard in the High Court.

(c) Applicant is a government servant and as submitted, it is highly unlikely to abscond as he has more to lose if he does so.

(d) Applicant has filed an appeal to the High Court and he has not exhausted the remedy accorded to him by law.

(e) In respect of his appeal, the applicant contends that he has merit on the ground that the requisite intention to deceive has never at all been made part of the charge against the applicant and the prosecution has not adduced any evidence on that crucial element of the charge (para 12 of the affidavit in support of Mr. Mohd. Ivan bin Hussein).

(f) Applicant is married with 5 children, aged between 13 and 3 years with an unemployed wife.

Giving due regard to all the aforesaid matters, and given the circumstances, in the exercise of my discretion pursuant to s. 311 of the Criminal Procedure Code (which is the discretion of the trial court at first instance), I allow the applicant's application and order that the applicant be released on bail in the sum of RM15,000 with two (2) sureties with a further order that the two sureties who had executed the bond in the court below can stand as sureties if they so desire.

(6) Next, as to the issue of whether the sum of RM4,000 cash bail deposited in the lower court is to be refunded, the learned Deputy Public Prosecutor has objected on the ground that it is not the appropriate forum to do so. Firstly, s. 325 of the Criminal Procedure Code states:

325. (1) **A Judge may,** in any case the **record of the proceedings** of which has been called for by himself or **which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311,** 315, 316 and 317 **of this Code.** (emphasis added)

Next, as I have at the outset stated the matter before me is an application *vide* a notice of motion pursuant to s. 311 of the Criminal Procedure Code for stay of execution of a sentence. In the course of this proceeding it has come to my knowledge regarding the imposition of the RM4,000 cash bail which was pointed out to the court by the learned counsel for the applicant. In *Hussaini Tan b. Mohamad Jaya Tan v. PP* (Criminal Revision No. 43-06-2003-III (II)) in my Ruling given on 13 November 2003, I had expressed that I agreed with the reasoning of Her Ladyship, Madam Elizabeth Chapman JC (as she then was) in *Lau Kung Seng & Ors v. PP* [1997] 5 MLJ 323, a case cited by Mr. Mohd. Osman bin Ibrahim in support of his application urging the court to exercise its revisionary powers, which I will refer hereafter.

In *Hussaini Tan b. Mohamad Jaya Tan*'s case *(supra)* in a criminal revision the issue was whether the imposition of RM2,000 cash bail by the learned magistrate when ordering the accused to execute a bond of good behaviour under s. 173A of the Criminal Procedure Code was proper and for a refund to the accused's (applicant's) mother if the court finds it to be improper and illegal. The applicant's counsel in the said case distinguished *Lau Kung Seng*'s case. Whilst agreeing with the applicant's counsel, in my Ruling I had, *inter alia*, stated:

(1) Section 403 of the Criminal Procedure Code (Act 593) (Revised-1999) ("the CPC") states:

> When any person is required by any Court or officer to execute a bond, with or without sureties, the Court or officer may, **except in the case of a bond for good behaviour,** permit him to deposit a sum of money to such amount as the Court may fix, instead of executing the bond. (emphasis added)

(2) A plain reading of the section reveals that in a situation where the Court orders any person who is required to execute a bond, *in lieu* of executing that bond, the Court may permit the person to deposit a sum of money to such amount as the Court may fix.

> The *ratio decidendi* in *Lau Kung Seng's & Ors v. PP* [1997] 5 MLJ 323 (cited by counsel for the applicant) is "The imposition of cash bail, otherwise than under the condition stipulated in section 403 of the CPC (FMS Cap. 6), is illegal. A magistrate is not bound to accept cash, but may permit an accused person to

deposit a sum of money *in lieu* of executing a personal bond and giving surety of some persons." (see Headnote (2)). Therefore I am in total agreement with the judgment of the Court in *Lau Kung Seng*'s case.

(3) However, in my view, this concession does not extend to a bond for good behaviour as is evident from the words "**except** in the case of a bond for good behaviour" in section 403.

Hence, I am of the considered opinion that the part of the order of the learned Sessions Court Judge made on 28 September 2004 ordering that RM4,000 already deposited in court to be kept in court as part of the condition of the bail is illegal.

Therefore in exercise of my powers under s. 325 read with s. 311 of the Criminal Procedure Code, I set aside the order of the learned Sessions Court Judge with respect to the imposition of the deposit into court of RM4,000 cash bail to continue as a condition of bail and order the said sum to be refunded to the applicant. I order accordingly.